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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO GARCIA RUBIO,

Defendant and Appellant.

2d Crim. No. B223558  
(Super. Ct. No. 2008041648)  
(Ventura County)

Alfonso Garcia Rubio appeals a judgment after his conviction after a jury trial of attempted murder (Pen. Code, §§ 664, 187, subd. (a), 189) and making criminal threats (§ 422).<sup>1</sup> The jury also found that Rubio personally and intentionally discharged a firearm. (§ 12022.53, subd. (c).) Rubio pled guilty to unlawful firearm activity (§ 12021, subd. (c)(1)) and violating a protective order (§ 166, subd. (c)(1)). We conclude, among other things, that: 1) the trial court did not contravene Rubio's right to a fair trial under *Chambers v. Mississippi* (1973) 410 U.S. 284 by excluding a medical report regarding Rubio's condition after the shooting, and 2) Rubio has not shown ineffective assistance of counsel on this record. We affirm.

FACTS

Maria Guadalupe Venegas was a waitress at the Mariscos El Pulpo restaurant. She had been married to Rubio for 14 years. In August 2008, she took her

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

children and left the home. Several weeks later, Rubio came to the restaurant and asked her "to go back with him." She refused. Rubio told her he had a gun, and if she did not come back, he would kill himself.

On the morning of September 10, 2008, Robert Melgoza, the restaurant manager, came to work and heard Rubio state, "One of the cooks here is doing my wife." Melgoza responded, "Nothing is going on here." Rubio then accused Melgoza of having an affair with her. Melgoza denied the accusation. Rubio told him, "I'm going to kill you. I'm going to fuck your wife, and I'm going to rape her." Rubio left after Melgoza told him he was going to call the police.

Later that day, Rubio returned with a handgun. Melgoza ran to the glass front door of the restaurant to try to lock it. When he reached the door, he saw Rubio pointing a gun at him. Rubio fired a shot through the glass door. Melgoza testified that as he tried to run away, Rubio "fired at [him] again," and said, "I'm going to kill you, fucker." Rubio broke through the glass door, entered and fired another shot. Melgoza tried to hide as Rubio searched for him in the restaurant. Melgoza saw the barrel of the gun. He grabbed it and tried to pull it away from Rubio. As they struggled, Rubio tried to point the gun at Melgoza. He cocked it and fired it as Melgoza was pushing the gun barrel upwards. During the struggle over the gun, Rubio said, "I'm going to kill you." Melgoza eventually took the gun away from Rubio.

Several people restrained Rubio until the police arrived. Rubio told the police that he brought the gun to the restaurant because Melgoza was "fucking [his] wife." He said he did not shoot the weapon and he did not use drugs or alcohol. Rubio sustained cuts and bruises. He was transported to a hospital to treat his injuries.

Xochitl Ramos, a waitress, testified that after Melgoza tried to close the door, Rubio pulled a gun and "shot at" Melgoza. Melgoza moved "to the wall" near the door. Rubio "moved to the corner to shoot him again."

Magdaleno Lopez, a cook, testified that, before the shooting, Rubio came to the restaurant and accused Melgoza of "going out with his wife." Melgoza replied, "It's not true." Rubio said, "You're going to regret this. I'm going to kill you."

In the defense case, Rubio testified that he went to the restaurant and confronted Melgoza who admitted that he was having an affair with Rubio's wife. Rubio threatened to tell Melgoza's wife about the affair. Melgoza told Rubio to leave, and he complied.

Rubio went home and drank beer and tequila. He planned to go back to the restaurant to scare Melgoza by shooting at the building. He then intended to commit suicide. Rubio arrived at the restaurant and shot through the glass door. He "fired just to scare" Melgoza. He went inside to fight with him. He did not remember whether he fired any additional shots. He did not intend to kill Melgoza. He was "[u]nder the influence of alcohol."

In the prosecution's rebuttal, Police Detective Robert Roldan testified that he and Detective Paul Knapp interviewed Rubio at the hospital on September 10th. Rubio showed no signs of being under the influence of alcohol.

#### *The Medical Report*

During the defense case, Rubio's counsel requested the trial court to admit a two-page printout of a September 10, 2008 emergency medical report by Dr. Gautam Pai as proof of Rubio's alcohol intoxication. The report contained an entry that a "Serum tox screen is positive for blood alcohol level of 60 otherwise negative." The court ruled the report was ambiguous because it did not indicate in lay terms what was the level of alcohol intoxication. The trial judge suggested that the defense should call Dr. Pai or another witness to explain the report and testify about the intoxication level. The document by itself could not be cross-examined. The defense did not call Dr. Pai or any other medical expert at trial.

### DISCUSSION

#### *Excluding the Medical Report*

Rubio contends that the trial court improperly excluded a medical report that would have corroborated his testimony about his voluntary intoxication. He claims this contravened his due process right to a fair trial under *Chambers v. Mississippi, supra*, 410 U.S. 284. We disagree.

In *Chambers*, a state trial court in a murder case prevented the defendant from questioning witnesses who claimed to have heard another party admit to the crime. This evidence was inadmissible hearsay under Mississippi law. But the United States Supreme Court ruled that the exclusion of this testimony was a denial of due process. It said, "The testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense." (*Chambers v. Mississippi, supra*, 410 U.S. at p. 302.) The court said, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Ibid.*) But "[i]n the exercise of this right, the accused . . . must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Ibid.*)

Here the trial court did not prevent Rubio from calling witnesses to corroborate his claim of voluntary intoxication. It did not reject his defense. In fact, the court *invited* defense counsel to call the doctor who treated Rubio as a witness. It said, "Certainly if the doctor were called to testify, he may testify to what his observations were with regard to alcohol intoxication." But the defense did not call Dr. Pai to testify. It did not call any medical experts or medical witnesses to corroborate the claim of voluntary intoxication. Instead, the defense merely requested that a two page medical report be admitted into evidence without any explanation or foundation testimony from any witness.

The Attorney General claims that the trial court properly excluded the medical report because: 1) it was ambiguous, 2) there was no witness to explain it, and 3) admitting only the medical report prevented the prosecution from cross-examining the contents of the document. We agree.

"[A] defendant does not have a constitutional right to the admission of unreliable hearsay statements." (*People v. Ayala* (2000) 23 Cal.4th 225, 269.)

"California has an interest 'in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.'" (*Id.* at p. 270.) Courts, consistent with due process retain "a

traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure . . . ." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Consequently, they may exclude confusing or ambiguous evidence particularly where its admission would not be accompanied with a witness and there is no opportunity for cross-examination or clarification. (*People v. Friend* (2009) 47 Cal.4th 1, 48; *People v. Price* (1991) 1 Cal.4th 324, 412.)

Here the medical report was ambiguous. It contains the statement "Serum tox screen is positive for blood alcohol level of 60 otherwise negative." The prosecution objected to its admission because the report provided no explanation regarding the alcohol intoxication level. The court noted that without a witness to explain the report, "[t]here is no way of knowing what the level of intoxication is . . . ." It said a witness "has to be available for cross-examination."

The trial court acted well within its discretion. Tox screen evidence is a medical procedure which is not within the common knowledge of lay people. Therefore, this evidence requires expert testimony to interpret it. (Evid. Code, § 801, subd. (a); *People v. Catlin* (2001) 26 Cal.4th 81, 131-133.) Moreover, here the court was not precluding Rubio from presenting corroborating medical evidence; it was concerned with the method he selected to introduce it. But the court nevertheless explained to the defense how to introduce this evidence. It said, "The way to do that would be to subpoena the doctor." The defense elected not to utilize that procedure. *Chambers* does not excuse defendants for failing to lay the proper foundation for the admissibility of documents. Documents are not self-admissible; the proponent "has the burden of establishing trustworthiness." (*People v. Beeler* (1995) 9 Cal.4th 953, 978.) Rubio has not shown any error.

There is no reasonable probability that the outcome would change had the report been admitted into evidence. Rubio's defense was based on alcohol intoxication. But the medical report reflects that Rubio had denied using alcohol. Consequently, the admission of the report would contain a prior inconsistent statement to impeach Rubio's

testimony. Rubio also told the police officer who arrived at the crime scene that he had not used alcohol.

To prove intent, the prosecution offered two witnesses who testified that Rubio had made threats to kill Melgoza. Jurors could infer this was not a random shooting by a man in a drunken stupor. It was a planned crime with a purpose--revenge, and a specific target--Melgoza. Rubio's death threats exposed his motive and his actions showed his intent. Ramos testified that Rubio fired the gun at Melgoza, and when Melgoza moved away, Rubio "moved to the corner to shoot him again." Melgoza testified that Rubio pointed the gun at him before he fired the shot through the glass door. When they struggled for the gun, Rubio said, "I'm going to kill you." The jury found these witnesses to be credible. Jurors could reasonably find that Melgoza would have been killed had he not grabbed the gun barrel and pushed it in an upward direction. The defense case was weak. Rubio lied to the police when he told them that he did not fire the gun he brought to the restaurant. The jury did not find him to be a credible witness.

Rubio notes that in the medical report Dr. Pai also makes a reference to "Alcohol intoxication." He claims this would have changed the result by independently bolstering his testimony. Alcohol intoxication is a defense if it negates his ability to form a specific intent to kill. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 396, 398.) But the defense made no offer of proof that it had any medical evidence on the impact of alcohol on his ability to form that intent. The medical report reflects that Rubio did not have any headaches, blurred vision, dizziness, nausea or vomiting. Consequently, he had none of the traditional symptoms of excessive drinking. Moreover, in his testimony, Rubio did not claim that he lacked the ability to form a specific intent for firing the first shot. To the contrary, he claimed *he had a specific intent*, an intent to shoot to scare Melgoza, a claim the jury rejected.

#### *Ineffective Assistance of Counsel*

Rubio contends that his trial counsel provided ineffective assistance because he argued admissibility without mentioning *Chambers v. Mississippi, supra*, 410 U.S. 284, and counsel was apparently unaware of that decision.

Ineffective assistance is established by showing "that counsel's performance was deficient" and "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Rubio suggests that: 1) his trial counsel did not make an adequate offer of proof about the importance of medical evidence to the alcohol intoxication defense, and 2) his counsel's failure to raise a "*Chambers* argument" was "prejudicial because corroborating evidence of intoxication could have caused the jury to find that appellant did not intend to kill or . . . that he lacked premeditation."

But when the trial court suggested that he subpoena Rubio's doctor, defense counsel made no response. We are unable to determine from this record what counsel knew. The record does not reflect: 1) whether Dr. Pai had an opinion on whether Rubio's alcohol level could impede his ability to form an intent to kill, or 2) whether Rubio's counsel talked to him and knew his opinion. If he knew the opinion was negative, that would explain why he did not subpoena him. On this record, there is no evidence that Rubio's counsel was ineffective.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Rebecca S. Riley, Judge  
Superior Court County of Ventura

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Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Charles S. Lee, Deputy Attorney General, for Plaintiff and Respondent.